Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-3 OF 1994 CONSOLIDATED WITH CIVIL APPEAL NO W-02-9 OF 1994
GOPAL SRI RAM, NH CHAN AND SITI NORMA YAAKOB JJCA
4 APRIL, 13 JULY 1995

Evidence *— Privilege — Self-incrimination, against — Witness required by law to disclose confidential information covered by Banking and Financial Insitutions Act 1989 — Whether witness subject to criminal liability — Whether there will be criminal liability if evidence given in Hong Kong — Bankers' Books (Evidence) Act 1949 s 6 — Banking and Financial Insitutions Act 1989 — Evidence Act 1950 s 132(2)*

Tort *— Breach of confidence — Disclosure of confidential information in proceedings in foreign court — When foreign tort actionable in Malaysia — Conditions to be satisfied*

Conflict of Laws *— Tort — Breach of confidence — Whether tort committed in foreign country actionable in Malaysia*

Conflict of Laws *— Foreign court — Taking of evidence for foreign court — Witness ordered to disclose confidential banking information — Whether subject to criminal liability*

Civil Procedure *— Declaratory judgment — Whether criminality or lawfulness of future conduct can be subject of declaratory relief*

Civil Procedure *— Appeal — Discretion of High Court judge — When Court of Appeal may exercise original discretion of its own*

Pursuant to an order made under O 66 and O 39 of the Rules of the High Court 1980 ('the RHC'), upon letters of request by the Supreme Court of Hong Kong, the High Court judge recorded evidence that was proposed to be used in criminal proceedings against the fourth respondent, George Tan, in Hong Kong. On 4 March 1992, the High Court had made an order under s 6 of the Bankers' Books (Evidence) Act 1949 ('the BBEA') requiring the first respondent to make disclosure upon a number of matters. The first and second respondents were officers of the third respondent, Bank Bumiputra Malaysia Bhd. In the course of the recording of evidence in the High Court, the first, second and third respondents took out a summons asking the court to declare, inter alia, whether an order made by the court pursuant to s 6 of the BBEA exempted them from committing any offence under s 97(1) of the Banking and Financial Institutions Act 1989 ('the BAFIA') or breaching their duties of confidentiality when giving evidence in Hong Kong. The High Court judge ruled that the protection given by s 6 of the BBEA and ss 97(2) and 100 of the BAFIA would only be available to them if they gave evidence in the High Court in Malaysia but not if they voluntarily agreed to and did give evidence in Hong Kong. [See [1994] 3 MLJ 480.] The

A Attorney General of Hong Kong appealed. The issues for the Court of Appeal's decision were: (a) whether in giving evidence either in Malaysia or in Hong Kong the respondents would be subjected to criminal or civil liability; (b) whether the court could grant the declaratory relief sought; and (c) even if it could, whether it ought to exercise its discretion to grant the declarations asked for.

B

Held, allowing the appeal:

(1) (Per **Gopal Sri Ram** and **NH Chan JJCA**) In Malaysia, the common law privilege against self-incrimination has been removed by s 132(1) of the Evidence Act 1950 ('the Act'). The section applies where a court in this country is recording evidence in municipal proceedings or in aid of proceedings pending before a foreign tribunal.

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(2) (Per **Gopal Sri Ram** and **NH Chan JJCA**) By virtue of s 132(2) of the Act, any answer which a witness is compelled by the court to give will not subject him to criminal liability. Thus, neither the first, second nor third respondent might be held criminally liable for the answers they provide whether in examination-in-chief or under cross-examination in the courts in Malaysia.

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(3) (Per **Gopal Sri Ram JCA**) As s 97 of the BAFIA was not expressed to have extra-territorial effect, a disclosure of confidential information in the courts of Hong Kong made in contravention of it could not found criminal liability in Malaysia. Therefore, the respondents would not be criminally liable if they were to give evidence in Hong Kong upon the matters covered by the letters of request. In any event, the rule against self-incrimination applies in Hong Kong. If the respondents were to be compelled by the judge in Hong Kong to answer questions put to them, the provision of the answers given under legal compulsion, even in breach of s 97 of the BAFIA, cannot be used to found criminal liability in Malaysia.

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(4) (Per **Gopal Sri Ram JCA**) For an alleged breach of confidence that occurred abroad to be actionable in Malaysia, it must first be actionable if the particular disclosure were made in Malaysia in the same circumstances in which it was made in the foreign country, and secondly the disclosure of the confidential information must not be justifiable by the law of the country in which the alleged breach of confidence occurred. In the present case, any action brought by a putative plaintiff against the first to third respondents for breach of confidence in their disclosure of confidential information before the courts of Hong Kong was bound to fail because it could not be established that the disclosure complained of, if made here, would be actionable under the law of Malaysia.

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(5) (Per **Gopal Sri Ram JCA**) The jurisdiction of a Malaysian court to grant declaratory relief arises from s 41 of the Specific Relief Act 1950 and its inherent jurisdiction.

(6) (Per **Gopal Sri Ram JCA**) When an appeal is brought against a decision of the High Court arrived at in the exercise of a discretion vested in it, the Court of Appeal will only become seized of an original discretion of its own after an appellant has demonstrated that the High Court erred in principle or took into account irrelevant considerations or failed to take into account relevant considerations or that the decision has occasioned a miscarriage of justice. The present case was one in which the Court of Appeal might exercise an original discretion.

(7) (Per **Gopal Sri Ram JCA**) Where criminal proceedings have not already been instituted, as in the present case, then the criminality or lawfulness of future conduct can more readily be the subject of declaratory relief although it would be a very exceptional case in which it would be right to grant such a declaration. In the present case, discretion should be exercised in favour of granting the declaratory relief sought. If discretion were exercised against the appellant, it would produce an unjust result in that the prosecution and the defence in the Hong Kong proceedings would be deprived of presenting relevant evidence before the jury.

Cases referred to

Blunt v Park Lane Hotels Ltd [1942] 2 KB 253 (refd)
Chan Kwon Fong & Anor v Chan Wah [1977] 1 MLJ 232 (folld)
Coco v AN Clark (Engineers) Ltd [1969] RPC 41 (refd)
Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 (refd)
Haji Othman Saat, Tan Sri v Mohamed bin Ismail [1982] 2 MLJ 177 (folld)
Imperial Tobacco Ltd & Anor v A-G [1981] AC 718; [1980] 1 All ER 866; [1980] 2 WLR 466 (distd)
Kuluwante (An infant) v Government of Malaysia & Anor [1978] 1 MLJ 92 (refd)
Norwich Pharmacal Co v Commissioners of Customs and Excise [1972] RPC 743 (CA); [1974] AC 133; [1973] 2 All ER 943; [1973] 3 WLR 164 (HL) (refd)
Othman bin Baginda, Dato Menteri & Anor v Ombi Syed Alwi bin Syed Idrus, Dato [1981] 1 MLJ 29 (refd)
Prince Albert v Strange (1849) 41 ER 1171 (refd)
Rediffusion (Hong Kong) Ltd v A-G of Hong Kong [1970] AC 1136 (refd)
Rex Co v Muirhead (1926) 136 LT 568 (refd)
Supreme General Films Exchange Ltd v Brijnath Singhji AIR 1975 SC 1810 (folld)
Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd [1983] 2 MLJ 346 (refd)

(8) (Per **NH Chan JCA**) As the respondents were protected by s 132(2) of the Act, the answers which had been protected under

A s 132(2), if repeated in a court of the country which had issued the letters of request, would be similarly protected as though the evidence were taken in Malaysia. Such protection also extended to answers obtained under cross-examination.

(9) (Per **NH Chan JCA**) As the protection afforded by s 132(2) of
B the Act did not protect the respondents in civil proceedings, the answers given in the courts in Malaysia would be admissible in civil proceedings brought against the respondents. However, in proceedings brought in Malaysia against the respondents for breach of confidence, the respondents could rely on the defence
C of just cause or excuse. There was no duty of confidence where the disclosure was made in obedience of the law. In this case, the duty of confidence was outweighed by the requirements of s 132(1) of the Act.

Cases referred to

D *Blunt v Park Lane Hotels Ltd* [1942] 2 KB 253 (refd)
Fraser v Evans [1969] 1 QB 349; [1969] 1 All ER 8; [1968] 3 WLR 1172 (folld)
Lamb v Munster (1882) 10 QBD 110 (refd)
Marcel v Commissioner of Police of the Metropolis [1992] Ch 225;
E [1992] 1 All ER 72; [1992] 2 WLR 50 (folld)
R v Boyes [1861–73] All ER 172 (refd)
R v Scott (1856) Dears & B 47; 169 ER 909 (refd)
Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd [1983] 2 MLJ 346 (refd)

F **[Bahasa Malaysia summary**

Mengikut satu perintah yang dibuat di bawah A 66 dan A 39 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), berikutan daripada surat-surat permintaan oleh Mahkamah Agung Hong Kong, hakim Mahkamah Tinggi telah mencatatkan keterangan yang dicadangkan
G untuk dikemukakan di dalam prosiding jenayah terhadap responden keempat, George Tan, di Hong Kong. Pada 4 Mac 1992, Mahkamah Tinggi telah membuat suatu perintah di bawah s 6 Akta Buku Banker (Keterangan) 1949 ('ABBK') yang mengkehendaki responden pertama membuat pendedahan tentang beberapa perkara. Responden
H pertama dan kedua adalah pegawai di responden ketiga, Bank Bumiputra Malaysia Bhd. Ketika catatan keterangan dijalankan di Mahkamah Tinggi, responden pertama, kedua dan ketiga telah mengeluarkan suatu saman yang memohon mahkamah membuat deklarasi, antara lainnya, sama ada satu perintah yang dibuat oleh
I mahkamah itu di bawah s 6 ABBK mengecualikan mereka daripada melakukan sebarang kesalahan di bawah s 97(1) Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABIK') atau melanggar kewajipan kerahsiaan mereka apabila memberikan keterangan di Hong Kong. Hakim Mahkamah Tinggi memutuskan bahawa perlindungan yang

diberikan oleh s 6 Akta ABBK serta ss 97(2) dan 100 ABIK itu cuma terpakai jika mereka memberikan keterangan di Mahkamah Tinggi di Malaysia tetapi tidak ada jika mereka secara sukarela bersetuju dan sememangnya memberikan keterangan di Hong Kong. [Lihat [1994] 3 MLJ 480.] Peguam Negara Hong Kong telah membuat rayuan. Isu-isu untuk keputusan Mahkamah Rayuan adalah: (a) sama ada dengan memberikan keterangan sama ada di Malaysia atau di Hong Kong responden-responden akan dikenakan liabiliti jenayah atau sivil; (b) sama ada mahkamah boleh memberikan relief deklaratori yang dipohon; dan (c) biarpun mahkamah boleh berbuat demikian, sama ada ia patut menjalankan budibicaranya untuk memberikan deklarasi yang dipohon itu.

Diputuskan, membenarkan rayuan itu:

(1) (Oleh **Gopal Sri Ram** dan **NH Chan HMR**) Di Malaysia, perlindungan common law terhadap pembabitan sendiri dengan kesalahan telah diketepikan oleh s 132(1) Akta Keterangan 1950 ('Akta itu'). Seksyen itu terpakai apabila sebuah mahkamah di dalam negara ini mencatat keterangan di dalam prosiding tempatan atau untuk membantu prosiding yang menunggu penyelesaian di hadapan satu tribunal luar negeri.

(2) (Oleh **Gopal Sri Ram** dan **NH Chan HMR**) Memandangkan s 132(2) Akta itu, sebarang jawapan yang seorang saksi itu dipaksa memberi oleh mahkamah tidak akan mengenakan liabiliti jenayah ke atasnya. Oleh itu, baik responden pertama, kedua mahupun ketiga tidak boleh dikenakan liabiliti jenayah untuk jawapan yang diberikan oleh mereka sama ada dalam pemeriksaan utama atau di bawah pemeriksaan balas di dalam mahkamah di Malaysia.

(3) (Oleh **Gopal Sri Ram HMR**) Oleh kerana s 97 ABIK tidak dinyatakan mempunyai kesan luar wilayah, suatu pendedahan maklumat sulit di mahkamah di Hong Kong yang dibuat dengan melanggarnya tidak boleh mengasaskan liabiliti jenayah di Malaysia. Lantaran itu, responden-responden tidak akan berliabiliti jenayah jika mereka memberi keterangan di Hong Kong atas perkara-perkara yang diliputi oleh surat-surat permintaan itu. Bagaimanapun, rukun terhadap pembabitan diri dengan kesalahan terpakai di Hong Kong. Jika responden-responden dipaksa oleh hakim di Hong Kong untuk menjawab soalan-soalan yang dikemukakan kepada mereka, pemberian jawapan yang dibuat di bawah paksaan undang-undang, biarpun melanggar s 97 ABIK, tidak boleh digunakan untuk mengasaskan liabiliti jenayah di Malaysia.

(4) (Oleh **Gopal Sri Ram HMR**) Supaya satu pemecahan kerahsiaan yang berlaku di luar negeri boleh didakwa di Malaysia, ia pertamanya mesti boleh didakwa jika pendedahan tersebut telah dilakukan di Malaysia di bawah keadaan yang sama di mana

A ianya dilakukan di negara asing itu, dan kedua, pendedahan maklumat sulit itu mestilah tidak berjustifikasi mengikut undang-undang negara di dalam mana pemecahan kerahsiaan yang dikatakan itu telah berlaku. Di dalam kes ini, sebarang tindakan yang dibawa oleh seorang bakal plaintif terhadap responden-responden pertama ke ketiga untuk pemecahan kerahsiaan melalui pendedahan maklumat sulit di hadapan mahkamah Hong Kong tentunya gagal kerana tidak boleh ditunjukkan bahawa pendedahan yang dijadikan aduan itu, jika dilakukan di sini, boleh didakwa di bawah undang-undang Malaysia.

(5) (Oleh **Gopal Sri Ram HMR**) Bidang kuasa sesebuah mahkamah Malaysia untuk memberikan relief deklaratori timbul daripada s 41 Akta Relief Spesifik 1950 dan bidang kuasa sedia adanya.

(6) (Oleh **Gopal Sri Ram HMR**) Apabila sesuatu rayuan dibawa terhadap satu keputusan sebuah Mahkamah Tinggi yang dicapai dalam menjalankan satu budi bicara yang terletak padanya, Mahkamah Rayuan cuma akan mempunyai budi bicara asalnya sendiri selepas perayu telah menunjukkan bahawa Mahkamah Tinggi itu telah tersilap dalam prinsip atau bahawa ia telah mengambil kira pertimbangan yang tidak relevan atau gagal mengambil kira pertimbangan yang relevan atau bahawa keputusan itu telah mengakibatkan suatu salah laksana keadilan. Kes sekarang ini adalah satu kes di mana Mahkamah Rayuan boleh menjalankan budi bicara asal.

(7) (Oleh **Gopal Sri Ram HMR**) Di mana prosiding jenayah belum lagi dimulakan, seperti di dalam kes ini, maka soal sama ada sesuatu tindakan masa depan akan bersifat jenayah atau sah di sisi undang-undang lebih mudah dijadikan perkara suatu permohonan untuk relief yang bersifat deklaratori. Namun begitu, deklarasi sedemikian hanya boleh diberikan dengan betul di dalam suatu kes yang sangat luar biasa. Di dalam kes ini, budi bicara patut dijalankan untuk memberikan relief deklaratori yang dipohon itu. Jika budi bicara dijalankan secara menentang perayu, ia akan mengakibatkan satu keputusan yang tidak adil kerana pihak pendakwa dan pihak pembela di dalam prosiding di Hong Kong akan kehilangan peluang mengemukakan keterangan yang relevan di depan juri.

(8) (Oleh **NH Chan HMR**) Oleh kerana responden-responden dilindungi oleh s 132(2) Akta itu, jawapan-jawapan yang dilindungi di bawah s 132(2), jika diulangi di dalam mahkamah negara yang telah mengeluarkan surat-surat permintaan itu, akan turut dilindungi seperti jika keterangan itu dicatatkan di Malaysia. Perlindungan sedemikian juga merangkumi jawapan-jawapan yang diperolehi di bawah pemeriksaan balas.

(9) (Oleh **NH Chan HMR**) Oleh kerana perlindungan yang diberikan oleh s 132(2) Akta itu tidak melindungi responden-responden di dalam prosiding sivil, jawapan yang diberikan di dalam mahkamah

di Malaysia boleh diterima di dalam prosiding sivil yang dibawa terhadap responden-responden itu. Namun demikian, di dalam prosiding yang dibawa di Malaysia terhadap responden-responden itu untuk pemecahan kerahsiaan, responden-responden boleh bergantung kepada pembelaan sebab yang berpatutan. Tidak terdapat kewajipan kerahsiaan di mana pendedahan dibuat menurut undang-undang. Di dalam kes ini, kewajipan kerahsiaan telah diatasi oleh keperluan s 132(1) Akta itu.]

Notes

For cases on privilege against self-incrimination, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1394–1400.

For a case on the taking of evidence for a foreign court, see 3 *Mallal's Digest* (4th Ed, 1993 Reissue) para 615.

For cases on appeals against the exercise of discretion, see 2 *Mallal's Digest* (4th Ed, 1993 Reissue) paras 346–358.

For cases on declaratory judgments, see 2 *Mallal's Digest* (4th Ed, 1993 Reissue) paras 1129–1132.

Complete list of cases referred to

Blunt v Park Lane Hotels Ltd [1942] 2 KB 253

Chan Kwon Fong & Anor v Chan Wah [1977] 1 MLJ 232

Coco v AN Clark (Engineers) Ltd [1969] RPC 41

Othman bin Baginda, Dato Menteri & Anor v Ombi Syed Alwi bin Syed Idrus, Dato [1981] 1 MLJ 29

Fraser v Evans [1969] 1 QB 349; [1969] 1 All ER 8; [1968] 3 WLR 1172

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12

Haji Othman Saat, Tan Sri v Mohamed bin Ismail [1982] 2 MLJ 177

Imperial Tobacco Ltd & Anor v A-G [1981] AC 718; [1980] 1 All ER 866; [1980] 2 WLR 466

Kuluwante (An infant) v Government of Malaysia & Anor [1978] 1 MLJ 92

Lamb v Munster (1882) 10 QBD 110

Marcel v Commissioner of Police of the Metropolis [1992] Ch 225; [1992] 1 All ER 72; [1992] 2 WLR 50

Norwich Pharmacal Co v Commissioners of Customs and Excise [1972] RPC 743 (CA); [1974] AC 133; [1973] 2 All ER 943; [1973] 3 WLR 164 (HL)

Prince Albert v Strange (1849) 41 ER 1171

Rediffusion (Hong Kong) Ltd v A-G of Hong Kong [1970] AC 1136

R v Boyes [1861–73] All ER 172

R v Scott (1856) Dears & B 47; 169 ER 909

Rex Co v Muirhead (1926) 136 LT 568

Supreme General Films Exchange Ltd v Brijnath Singhji AIR 1975 SC 1810

Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd [1983] 2 MLJ 346

Legislation referred to

Bankers Books (Evidence) Act 1949 ss 6, 97, 103
Banking and Financial Institutions Act 1989
Evidence Act 1950 ss 123(1), 132
Specific Relief Act 1950 s 41
Rules of the High Court 1980 O 15 r 16, O 39, O 66
Specific Relief Act 1877 s 42 [Ind]

Appeal from: Originating Summons No Rl–24–58–91 (High Court, Kuala Lumpur)

Alan Martin Wilson QC (*Ira Biswas* with him) (*Chooi & Co*) for the appellant in Civil Appeal No W–02–3–94 and the fourth respondent in Civil Appeal No W–02–9–94.

S Suhendran (*Saheran & Woon*) for the first, second and third respondents in Civil Appeals No W–02–3–94 and W–02–9–94.

Sir Michael Ogden QC (*BE Teh* with him) (*Teh & Associates*) for the fourth respondent in Civil Appeal No W–02–3–94 and the appellant in Civil Appeal No W–02–9–94.

Cur Adv Vult

Gopal Sri Ram JCA: These appeals, which were heard together, arise in the following way. The learned judge in the court below was in the process of recording evidence that is proposed to be used in criminal proceedings in Hong Kong. He was acting pursuant to an order made under O 66 and O 39 of the Rules of the High Court 1980, upon letters of request issued by the Supreme Court of Hong Kong. In the midst of carrying out that task, he was required to deal with a summons taken out by the first, second and third respondents asking for certain declarations. I will say more about this in a moment.

The first and second respondents are officers of the third respondent bank. They are potential witnesses in the proceedings before the learned judge. They have also expressed their willingness to give evidence before the court in Hong Kong. But they and their employer were concerned about the resultant implications of giving evidence. They genuinely entertain a fear that by doing so they may be prosecuted for offences under the Banking and Financial Institutions Act 1989, or 'BAFIA', as that Act is commonly referred to. They are also concerned that they may become liable civilly in the event of their making disclosure of confidential information in the course of giving evidence. Before proceeding any further, I must make mention of the fact that on 4 March 1992, the High Court had made an order under s 6 of the Bankers Books (Evidence) Act 1949, (referred to in the court below as 'the BBEA') requiring the first respondent to make disclosure upon a number of matters.

The apprehension operating upon the minds of the first, second and third respondents is summarized in paras 10, 11, 15, 17 and 18 of the

affidavit of the first respondent affirmed on 6 May 1994, and they read as follows:

> 10 The bank was also advised that the BBEA order obtained in Malaysia would not operate to exempt the officers from any such disclosure in Hong Kong as the order would only operate in relation to the giving of evidence in these proceedings in Malaysia. Further, I am advised and verily believe that in all events, the BBEA order would only apply to exempt the officers/the bank in relation to the disclosure of information relating to the areas covered by the BBEA order itself.
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> 11 In view of the advice, the officers feel that they are unable to give evidence in Hong Kong. However, as the issue has, to the best of my knowledge, not been considered by the Malaysian courts, the bank and the officers have authorized the filing of this application for a ruling by this honourable court.
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> 15 Depending on the reasoning of and orders made by this honourable court in this application, the officers may opt to give evidence in Hong Kong. However, as matters stand it appears that the examination of the officers and other employees of the bank will take place in Malaysia.
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> 17 I have been advised by my solicitors and verily believe that the BBEA order will exempt the officers from any offence with respect to s 97(1) of BAFIA and the breach of any common law obligation of secrecy in the event of disclosure during the course of these proceedings in Malaysia.
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> 18 However, I am further advised by my solicitors and verily believe that the BBEA order is limited in its operation and the protection will only apply to exempt the officers from their obligations of secrecy in relation to the areas set out therein. Accordingly, I believe that the examination and cross-examination of the officers should be limited to the areas set out in the BBEA order so as to protect the officers from committing any offence or from breaching any obligation of secrecy.

On 6 May 1994, the first to the third respondents took out a summons asking for certain declarations. I will not set them out here. The learned judge rightly formed the view that the declarations sought were too wide. He invited the parties before him to narrow down the scope of the declarations prayed for. Counsel set about that task and produced the following compromise:

> (a) We are all agreed that in the absence of an order made under s 6 of the Bankers' Books (Evidence) Act 1949 ('BBEA'), it is an offence under s 97(1) of the Banking And Financial Institutions Act 1989 and a breach of the duties of confidentiality under common law for the applicant witnesses to give evidence in Hong Kong or in Malaysia.
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> (b) Subject to paras (i) and (ii) below which define the issues between the parties, we are all agreed that once an order is made under s 6 of the BBEA, the provisions of s 97(1) and the duties of confidentiality under common law do not apply:
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> (i) whether an order made by this court pursuant to s 6 of the BBEA exempts the applicant witnesses from committing any offence under s 97(1) or breaching their duties of confidentiality when giving evidence in Hong Kong; and

A (ii) if applicant witnesses give their evidence in Malaysia is their evidence to be restricted solely to what is contained in the letters of request, the orders made under O 66 or the order made pursuant to s 6 of the BBEA.

On 11 May 1994, the first and second respondents appeared before the B learned judge and expressed their readiness and willingness to appear and give evidence before the court in Hong Kong. They repeated their concerns about giving such evidence.

When the summons came on for hearing, the learned judge voiced his concerns about the question posed in (b)(ii). As a result, arguments were confined to the issue raised in (b)(i). After hearing argument, the C learned judge expressed the following view ([1994] 3 MLJ 480 at p 486):

> Having considered this application and the arguments of all parties, I say, with respect, I find merit in the argument of Mr Suhendran that the protection given by s 6 of the BBEA and ss 97(2) and 100 of the BAFIA would only be available to the witnesses if they give their evidence in our D High Court here in Malaysia in compliance with the court's order under s 6 of the BBEA. I rule they would not have the protection of the court if they voluntarily agree and do give evidence in Hong Kong. I say this, not even in pursuance and in compliance with a court order here and they were to continue with that evidence in Hong Kong for the order that gives them that protection can only operate within the territorial limits of the court's E jurisdiction [and is] not extra territorial.

The effect of this ruling, with respect, is to produce an incongruent result. It amounts to this. If the first to the third respondents give evidence upon a matter before the recording judge in this country, they would not be either civilly or criminally liable. Again, if their depositions taken here are F read out to a jury in Hong Kong, there would be no liability attached to them. Yet, if they appear in person before the very same jury and give viva voce evidence upon the same matters and even repeat *ipsissima verba* the very same answers given in their respective depositions, they will be liable to be sued and prosecuted. I think that it is quite illogical if such an incongruous consequence should result. In my judgment, such a result will G not follow if the correct approach is adopted.

To begin with, the following matters of importance must not be forgotten: (1) the prosecution, led by the Attorney General of Hong Kong wants these witnesses to give evidence before the court of the Colony; (2) the defence wish to cross-examine these witnesses before a jury in H Hong Kong since questions of credibility are involved; (3) the witnesses themselves are ready and willing to give evidence before the court in Hong Kong; and (4) our courts have, in accordance with well-established principles, decided to aid the foreign court in the gathering of evidence so as to meet the interests of justice. Accordingly, all that is done in aid of the I foreign proceeding must be directed at the attainment of justice. In the present context, everything that is lawfully possible must be done to lend the witnesses such comfort as will enable them to testify freely before the foreign court without any apprehension operating upon their minds. That is the object all before us seek to achieve. And I am most disinclined not

to have the result all intend to have unless the law does not permit it. But I think that it does.

Criminal liability of which the first to the third respondents apprehend stems from the possible breach of s 97 of the BAFIA which attracts punishment under s 103 of the same Act. Section 97 provides as follows:

> 97 Secrecy.
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> (1) No director or officer of any licensed institution, whether during his tenure of office, or during his employment, or thereafter, and no person who for any reason, has by any means access to any record, book, register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular, the account, of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.
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> (2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made, lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.
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> (3) No person who has any information or document which to his knowledge has been disclosed in contravention of subsection (1) shall in any manner howsoever disclose the same to any other person.

I think that for completeness I ought to set out s 6 of the BBEA which reads as follows:

> An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause.

While focusing their attention on these sections, counsel appear to have completely overlooked what I believe to be a most important statutory provision. It is s 132 of the Evidence Act 1950 which reads as follows:

> (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> (2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

A (3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of subsection (2).

In *Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346, my learned brother NH Chan J (as he then was) B reviewed several authorities and, in my respectful opinion, rightly held that the effect of the section is to do away with the privilege against self-incrimination that is part of English common law. Suzanne McNicoll in her treatise on the *Law of Privilege* (1992 Ed), provides the following comprehensive statement of the rule, attributing it to the formulation of it by Lord Goddard in *Blunt v Park Lane Hotels Ltd* [1942] 2 KB 253:

C

> It is a fundamental principle of the common law that, in civil and criminal cases, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person, either directly or indirectly, to a criminal conviction, the imposition of a penalty or the forfeiture of an estate.

D As observed, s 132 has excluded the operation of this doctrine in our jurisprudence. The section applies where a court in this country is recording evidence in municipal proceedings or in aid of proceedings pending before a foreign tribunal. It is to be applied in this way. If a witness is asked a question the answer to which may expose him to one or more of the E consequences envisaged by the section, the court must direct the witness to answer the particular question, explaining to him that he is under compulsion to provide the answer and explain to the witness that any answer he may give cannot be used as the basis of criminal liability.

In the context of the present appeals, the first and second respondents F are not excused, while giving evidence before the learned judge from declining to answer any relevant question asked of either of them. However, once it appears to the learned judge that the answer to any particular question may result in one or more of the consequences described in s 132(1), he must carry out the exercise set out in sub-s (3) thereof. In this way, neither the first, second nor third respondent may be held criminally G liable for the answers they provide whether in examination-in-chief or under cross-examination.

I cannot see that a different result would ensue if these witnesses were to give evidence in Hong Kong upon those matters covered by the letters of request. In the case of criminal liability, s 97 of the BAFIA is not H expressed to have extra-territorial effect. Therefore, a disclosure made in contravention of it cannot found the basis of criminal liability in this country.

Even if I am wrong in the view that I have expressed about the section having no extra-territorial effect, any answer given by these witnesses before the court in Hong Kong will be governed by the law of that Colony. I As I understand that law, the rule against self-incrimination applies in favour of witnesses who testify in criminal proceedings. (See *Criminal Evidence in Hong Kong* by Bruce & McCoy (1987 Ed).) It is for the judge trying the case in Hong Kong to determine whether to compel these

witnesses or either of them to answer questions put to them. And if he compels the first or second respondent or either of them to answer a particular question, then I cannot see how the provision of that answer given under legal compulsion, even in breach of s 97 of the BAFIA, may be used to found criminal liability in this country.

I now turn to consider the existence of civil liability, if any, for disclosure of confidential information. This aspect of the case has been carefully considered by my learned brother NH Chan JCA in his judgment which I have had the benefit of reading in draft. I am in agreement with the reasons given by my learned brother for holding that no action will lie against the first to the third respondents in respect of the disclosure by any of them of confidential information made in the course of giving evidence before the learned judge in this country.

As far as the proceedings in Hong Kong are concerned, I am of the view that the disclosure by the first or second respondent or either of them of confidential information made before a court of that Colony would not expose them or either of them to any action for breach of confidence in this country. My reasons for the view I hold now follow.

The duty to keep confidences whether of a personal or commercial nature is essentially part of equity jurisprudence, although more recent authority supports the foundation of the doctrine on the wider concept of public interest. (See *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1972] RPC 743 at p 746, per Lord Denning MR, reversed on other grounds in [1974] AC 133; [1973] 2 All ER 943; [1973] 3 WLR 164.) The doctrine protects the use or publication of one's personal or trade secrets obtained in consequence of a confidential relationship whether arising from or independent of contract: *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at p 46. And the doctrine extends even to strangers who come upon such confidential information: *Rex Co v Muirhead* (1926) 136 LT 568 at p 573 per Clauson J.

Traditionally, equity regards the publication or a threat to publish or to use confidential information as a wrong. A threat to use or to publish may be restrained by an injunction. If the wrong has already been done, in the sense that the offending material has already been used or published, then, the appropriate remedy may be obtained. In a case where confidential information has been wrongly used, an account of moneys earned by such wrongful use may be had. Where, however, the information has been published, then damages may be the appropriate remedy, accompanied by an injunction restraining further publication.

The juridical basis for the doctrine is to be found in the following passage in the judgment of Lord Cottenham in *Prince Albert v Strange* (1849) 41 ER 1171 at p 1179, a case that is generally regarded as the source of all authority upon the subject:

> Some minor points were raised at the Bar, to which I will shortly advert. It was contended, there ought not to be any injunction until the plaintiff had established his title at law; and cases were referred to, in which it was supposed I had laid down rules establishing such a proposition. The cases

A referred to are cases in which the equitable jurisdiction arose from some legal title, and was exercised solely for the purpose of protecting the party in the enjoyment of such legal title, and they have no application to cases in which this court exercises an original and independent jurisdiction, not for the protection of a merely legal right, but *to prevent what this court considers and treats as a wrong, whether arising from violation of unquestioned right or from* B *breach of trust, confidence or contract,* as in the present case, and in the case of Mr Abernethy's lectures. But, even in the cases so referred to, I have always held, that it was for the discretion of the court to consider whether the defendant might not sustain greater injury from an improper injunction, than the plaintiff from delay in granting it. In the present case, where the privacy is the right invaded, the postponing of the injunction would be the C equivalent to denying it altogether. The interposition of this court in these cases does not depend on any legal right; and to be effectual, it must be immediate. (Emphasis added.)

The point that emerges from *Prince Albert* and all the learning that has followed upon it leaves me with the impression that although breach of D confidence is a wrong *sui generis*, it is by its very nature akin to tortious wrongdoing. In my judgment, in the field of private international law, for the purpose of characterization, the principles that are to govern this wrong are the same as those which govern the commission of a foreign tort. It is to those principles that I shall now refer.

E In order to render an alleged breach of confidence that occurs abroad actionable in this country, two conditions must be satisfied. First, it must be actionable if the particular disclosure was made in Malaysia in the same circumstances in which it was made in the foreign country. Secondly, the disclosure of the confidential information of which complaint is made must not be justifiable by the law of the country in which the alleged F breach of confidence occurred.

I derive support for the view I take of the matter from the decision of the Federal Court in *Chan Kwon Fong & Anor v Chan Wah* [1977] 1 MLJ 232. Raja Azlan Shah FJ (as he then was), delivering the unanimous decision of the court, reviewed the authorities and set out the applicable G law with such trenchant lucidity that I think it desirable that his words be reproduced in extenso. This is what he said [at p 233 col 1G to p 234 col 1F]:

> It is necessary, in my view, to ascertain the rule of private international law which defines the conditions of civil liability in this country for an act done abroad. As the law stands it must be accepted that an action of tort will lie H in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. Firstly, the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed.
>
> I It was Willes J who expressed the proposition some 100 years ago in *Phillips v Eyre* (1870) LR 6 QB 1 at pp 28–29, a case concerning the jurisdiction of English courts in cases of foreign torts. The first branch of the statement was derived from the decision in *Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Banham ('The Halley')* (1868) LR 2 PC

193 although in that case the Privy Council held that the defendant was not liable in England for an act done abroad by another defendant, not because of the character of the act according to English law, but because the person who did it was not one for whose defaults the defendant was liable according to English law. This branch of Willes J's statement of the law is free from ambiguity. It is the second branch of his statement, expressed by the phrase 'not justifiable', that has provoked criticism. The respondent claimed that he needed only to establish the first branch of the rule, not the second. In other words, it is said in order to found jurisdiction in respect of a foreign tort, a plaintiff need only prove that the wrong is of such a character that it is actionable according to the *lex fori*, and if that is established, then it is for the defence to show that the wrong is justified by the *lex loci delicti*, relying on the words of Rigby LJ in *Machado v Fontes* [1897] 2 QB 231 at p 235:

> 'I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shewn to be justified or excused in the country where it was published'

a negative averment, thus falling on the defence to establish it.

Machado v Fontes has been the subject of much criticism ever since its birth. It has been followed in Canada, doubted in the Privy Council, severely criticized in Australia, and not followed in Scotland, where it has long been settled law that 'not justifiable' means 'actionable'. It has also been severely criticized by academic writers (see Dicey & Morris in *Conflict of Laws* (9th Ed) at p 943). In *Machado v Fontes* it was held that if the act was contrary in any respect to the law of that country, then, although it gave rise to no civil liability there, it was not justifiable there, and the second branch of the rule was therefore not established. The High Court in Australia in *Koop v Bebb* (1951) 84 CLR 629 rejected *Machado v Fontes* saying that that decision went too far. The House of Lords in *Boys v Chaplin* [1971] AC 356 at p 377 overruled *Machado v Fontes*. Lord Hodson dealt with the matter in the following words:

> 'If the decision in *Machado v Fontes* could be supported on the ground that actionability is not essential the respondent must succeed but, in my opinion, that decision is wrong and should be overruled.'

In my opinion, with regard to the choice of law the generally accepted rule is that an act committed abroad is a tort and actionable as such, only if it is both actionable as a tort in this country as well as in the country where it was done. It is here we must be careful to consider two separate issues — jurisdiction and the choice of law, for they are logically distinct and separate. Windeyer J in *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at p 42 puts the matter succinctly in this passage:

> 'When in *Koop v Bebb* this court spoke of "the rule of private international law which defines the conditions of civil liability" in one state for an act done in another, the reference was not, as I read the judgment, merely to the entertaining of an action but also to the substantive law for determining liability in an action.'

Once the cause of action is established, then it is a matter of determining the nature of the plaintiff's remedy which is partly procedural and partly substantive — the actual quantification of damages under the relevant heads being procedural; questions whether loss of earning capacity or pain

and suffering are admissible heads of damage being questions of substantive law. I may as well add that the nature of the plaintiff's remedy is to be determined by the *lex fori*. (See the speech of Lord Hodson in *Boys v Chaplin* at pp 378, 379).

Accordingly our courts, following English practice, have jurisdiction in respect of foreign torts whenever we have jurisdiction in personam over the defendant. That is clearly stated in *Halsbury's Laws of England* (4th Ed) para 406 at p 308:

> 'In general, the English court has jurisdiction in actions in personam against any person who is present in England when the writ of summons or other originating process is served upon him. As a general rule the domicile, residence and nationality of the parties are all immaterial. In certain cases the court may make an order for substituted service, or for service outside the jurisdiction.
>
> The parties may by their conduct give the English court a jurisdiction which it would not otherwise possess. By coming to the English court as a plaintiff, a person gives it jurisdiction over any counterclaim brought by the defendant. A writ is deemed to have been duly served on the defendant if he enters an unconditional appearance, or if his solicitor indorses on the writ a statement that he accepts service of the writ on his behalf. A contract may provide that the English court shall have jurisdiction over any action in respect of the contract, and may contain special provisions as to the mode and place of service.'

See also rr 20 and 21, Dicey & Morris, *Conflict of Laws* (9th Ed).

Section 23(1)(b) of the Courts of Judicature Act 1964 is declaratory of this rule. It enacts (inter alia) that:

> '... the High Courts shall have jurisdiction to try all civil proceedings where the defendant or one of several defendants resides or has his place of business ... within the local jurisdiction of the court ...'.

In my opinion, no difficulty arises in this case as to the High Court's jurisdiction over the appellants. The trouble starts when we consider the choice of law. It is here, in my view, the respondent has to establish both the conditions laid down in *Phillips v Eyre* (1870) LR 6 QB 1. Dicey & Morris in their *Conflict of Laws* (9th Ed) r 178, supports this view; so also *Halsbury's Laws of England*, (4th Ed) paras 615–620.

Returning to the case at hand, it is clear that any action brought by a putative plaintiff against the first to the third respondents complaining about the latter's disclosure of confidential information before the courts of Hong Kong is doomed to failure because any such plaintiff will be unable to satisfy the first requirement alluded to by his Lordship in *Chan Kwon Fong* [1977] 1 MLJ 232. Put simply, it cannot be established in any such action as postulated that the disclosure complained of if made here will be actionable under the *lex fori*. That is because any such disclosure, if made in this country in similar circumstances, would not, for the reasons appearing in my learned brother NH Chan J's judgment, expose the first to the third respondents to civil liability. Since the respondent witnesses as well as the respondent bank will not be liable under the *lex fori*, it matters not a jot whether they or any of them may be liable under the *lex loci delicti*.

That brings me to the next issue. Can this court grant the declaratory relief sought for? Further, even if we could, ought this court exercise its discretion and grant the declarations asked for? Upon both these questions, Mr Wilson of counsel for the Attorney General of Hong Kong and Sir Michael Ogden for the appellant, George Tan, stand on common ground in maintaining that this court has jurisdiction to declare the law of this country. They also are agreed that discretion ought to be exercised in favour of the grant of a declaration. I think that counsel are correct in both arguments.

Now, the jurisdiction of a Malaysian court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s 41 of the Specific Relief Act 1950 which reads as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
>
> Explanation — A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

The procedural adjunct to the statutory basis is to be found in O 15 r 16 of the Rules of the High Court 1980, which provides as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

The alternative basis for the grant of declaratory relief — a jurisdiction of great antiquity — is the inherent jurisdiction of the court: *Kuluwante (An infant) v Government of Malaysia & Anor* [1978] 1 MLJ 92. It has long been recognized by Indian courts administering their Specific Relief Act 1877 (later revised and re-enacted in 1963) that s 42 of that enactment, which is identical to s 41 of our statute is not a complete code upon the subject of declaratory decrees.

In *Supreme General Films Exchange Ltd v Brijnath Singhji* AIR 1975 SC 1810, Beg J explained the scope of the declaratory jurisdiction in these words:

> *Kishori Lal*'s case AIR 1952 Punj 387 was cited to show that declaratory decrees falling outside s 42 of the Specific Relief Act are not permissible because s 42, Specific Relief Act is exhaustive on this subject. This view must be held to have been rejected by this court when it declared in *Vemareddi Ramaraghava Reddy v Konduru Seshu Reddy* 1966 Supp SCR 270 at p 277; AIR 1967 SC 436 at p 440:
>
> > 'In our opinion, s 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the courts have

power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of s 42 of the Specific Relief Act.'

The result is that s 42 merely gives statutory recognition to a well-recognized type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of courts to give declarations of right in appropriate cases falling outside s 42.

We think that the circumstances in which a declaratory decree under s 42 should be awarded is a matter of discretion depending upon the facts of each case. No doubt a complete stranger whose interest is not affected by another's legal character or who has no interest in another's property could not get a declaration under s 42, Specific Relief Act with reference to the legal character or the property involved.

The Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 cited and applied the decision of the Indian Supreme Court in *Supreme General Films Exchange Ltd* and in other Indian cases. The relevant passage reads as follows [at p 178]:

It will be necessary at the outset to consider the scope of the power to grant declaratory orders and judgments. Chapter VI of the Specific Relief Act 1950 deals with declaratory decrees and s 41 thereof provides for the discretion of the court as to declarations of status or right. Section 41 of the Specific Relief Act was textually adopted *totidem verbis* from s 42 of the Indian Specific Relief Act 1877 (now s 34 of the Indian Specific Relief Act 1963), and on an application of the law enunciated by the Privy Council and the Supreme Court of India in relation to the equivalent provisions in the Indian Specific Relief Act and Civil Procedure Code, s 41 of the Specific Relief Act gives statutory recognition to a well-recognized type of declaratory relief and subjects it to a limitation but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of the courts to give declarations of right in appropriate cases falling outside it. The court has power to grant such a decree independently of the requirements of the section, and such a declaration outside the purview of this statutory enactment will be governed by the general provisions of O 15 r 16 of the Rules of the High Court 1980 which will then apply [*Supreme General Films Exchange Ltd v His Highness Maharaja Sir Brijnath Singhji Deo of Maihar & Ors,* following *Vemareddi Ramaraghava Reddy & Ors v Konduru Seshu Reddy & Ors* relying on the decisions of the Privy Council in *Fischer v Secretary of State for India in Council* (1899) 26 IA 16 and *Partab Singh v Bhabuti Singh* (1913) 40 IA 182].

While I cannot possibly agree to the reference to O 15 r 16 as providing a jurisdictional basis (see *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12), I respectfully agree with the proposition that s 42 is not exhaustive and does not constitute the sole jurisdictional basis for the grant of declaratory relief.

The next point that falls to be considered is whether discretion ought to be exercised in favour of the appellants. Before dealing with this aspect of the case, it is necessary to state the principles on which this court will

interfere with a decision of the High Court arrived at in the exercise of a discretion vested in it. In an appeal such as the present, where relief is granted or withheld in the exercise of discretion, the initial function of the Court of Appeal is one of review only. It is only after an appellant has demonstrated to a conviction that the High Court erred in principle or that it took into account irrelevant considerations or failed to take into account relevant considerations or that the decision has occasioned a miscarriage of justice that this court becomes seised of an original discretion of its own. The instant case is one which falls within those categories in which this court may exercise an original discretion. But, as I have earlier said, ought that discretion to be exercised in favour of the appellants? I think that it should. And my reasons for the view I hold are as follows.

It cannot be gainsaid that part of the declaration relates to the question whether the future course proposed by the first to the third respondents is criminal. It will be recalled that these respondents fear that they may be later held to have committed an offence under the BAFIA.

Now, there is no rule prohibiting a civil court from declaring that particular conduct is not criminal in nature. Historically, as a matter of discretion, such declarations were not granted because they do not bind a criminal court. And no court will act in vain by granting meaningless declarations. The true ambit of the discretion is explained in Zamir and Woolf on *The Declaratory Judgment* (2nd Ed) at p 174 et seq, and I can do no better than to quote the words of the learned authors of that treatise:

> *The strict approach to criminal proceedings*
>
> Where it is doubtful whether particular conduct involves the commission of a criminal offence, it would be very convenient to be able to ascertain whether or not the conduct is in fact criminal by obtaining a ruling of the High Court in the form of a declaration. Indeed the ability to do so could avoid the unintentional commission of crimes and result in greater respect for the criminal law. However, the civil courts are reluctant to grant declaratory relief when this involves determining whether particular conduct amounts to a crime because the grant of a declaration could result in conflict between the civil and criminal courts, with the civil courts usurping the proper role of the criminal courts.
>
> If criminal proceedings, properly instituted, are neither vexatious nor an abuse of the process of the criminal court, it will not normally be a proper exercise of the court's discretion to grant the accused a declaration that the facts alleged by the prosecution do not in law establish the offence charged. This was made clear by the House of Lords in *Imperial Tobacco Ltd & Anor v A-G* [1981] AC 718, Lord Fraser alone recognizing that a declaration might possibly be granted 'in some very special circumstances'. In that case, the Director of Public Prosecutions had laid an information against the company alleging that it was distributing tickets in an unlawful lottery contrary to s 2(1)(b) of the Lotteries and Amusements Act 1976 and conducting an unlawful competition contrary to s 14(1)(b). The Director indicated to the company that he was proposing to proceed by indictment in the Crown Court but before the trial it issued an originating summons in the Commercial Court seeking a declaration that its conduct, constituting part of a sales promotion campaign, was lawful. In the Commercial Court,

A the Attorney General at first contended that the court had no jurisdiction to grant the declaration but later conceded the issue of jurisdiction and opposed the summons on the grounds of the court's discretion.

What was the proper issue was made clear in the speech of Lord Lane:

> 'There is no doubt that there is jurisdiction to grant a declaration in these circumstances. Anyone is on principle entitled to apply to the court for a declaration as to their rights unless statutorily prohibited expressly or by necessary implication: *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 and *London Borough of Ealing v Race Relations Board* [1972] AC 342. There was no such prohibition here; but was the learned judge right to exercise his discretion as he did, as the Court of Appeal thought he was?'

The answer of the House of Lords was 'No'.

In justifying their restrictive approach to the grant of declaratory relief, their Lordships emphasized the technical point that, if a declaration were to be granted, it would not bind the criminal courts. In reality, of course, the criminal courts would invariably follow any decision of the High Court even if they were not bound to do so.

However, where criminal proceedings have not already been instituted, then the criminality or lawfulness of future conduct can more readily be the subject of declaratory relief although, as Viscount Dilhorne stated in the *Imperial Tobacco* case, 'it would be a very exceptional case in which it would be right to grant such a declaration'. Such an exceptional case was *Airedale NHS Trust v Bland* [1993] AC 789. In that case a declaration was granted that the Trust could lawfully discontinue life sustaining treatment to a patient who was [in] a persistent vegetative state, although it was argued the withdrawal of treatment would be murder.

In the present case, unlike *Imperial Tobacco Ltd & Anor v A-G* [1981] AC 718; [1980] 1 All ER 866; [1980] 2 WLR 466, criminal proceedings have not been instituted against the relevant respondents. When one is considering discretionary remedies, it is particularly unhelpful to attempt a delineation of the ambit of discretion by resort to such terms as 'exceptional' or 'very exceptional'. Each case depends upon its own facts and to describe a case as 'exceptional' or 'very exceptional' helps only to cloud the true issue, which is, whether there are factors weighing in favour of granting the relief. It is, of course, quite proper to say that, in keeping with a settled practice of the court, discretion will be exercised in a particular way if certain facts are established.

In *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136, a case concerning declaratory relief, Lord Diplock expressed the true principle in words that merit recollection at p 1155:

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, ie to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

This passage was cited with approval and applied by our Federal Court in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

I have, earlier in this judgment, adverted to the various considerations operating upon this case. If discretion is exercised against the appellants it would produce an unjust result. The prosecution and the defence in the Hong Kong proceedings would be deprived of presenting relevant evidence before the jury. That in itself is a compelling reason to exercise discretion in favour of the appellants.

The appeal was accordingly allowed and by consent of counsel it was ordered that there be no order as to costs. Since the form of the declaration sought by the parties was found to be too wide, counsel at our request redrafted the declaration sought. A declaration was made in the following terms:

This court doth declare that if the first and second respondents in these consolidated appeals give evidence or disclose information or documents concerning the affairs or accounts of Bank Bumiputra Malaysia Bhd, Bumiputra Malaysia Finance Ltd or their customers, in Hong Kong in the trial of *R v George Tan Soon-Gin*, they will not be committing any offence under Malaysian law, nor will they be liable to civil proceedings in respect thereof provided that any such evidence or disclosure is confined to matters and topics raised in any letter of request in these proceedings and relevant cross-examination.

NH Chan JCA: The common law rule against self-incrimination was stated by Goddard LJ in *Blunt v Park Lane Hotels Ltd* [1942] 2 KB 253 at p 257 thus:

> ... the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for. This rule was laid down by the Queen's Bench in *R v Boyes* 1 B&S 311, and the words in which I have stated it are those of Stephen J in *Lamb v Munster* (1882) 10 QBD 110.

Goddard LJ acknowledged that he had adopted the words of Stephen J in *Lamb v Munster* (1882) 10 QBD 110. This is what Stephen J said (at pp 112 and 113):

> ... the privilege extends to protect a man from answering any question which 'would in the opinion of the judge have a tendency to expose the witness, or the wife or husband of the witness, to any criminal charge': *Stephen's Dig of the Law of Ev* (3rd Ed) art 120 at p 121.

It will be seen that the privilege applies to not answering the questions put to the witness. This is how Stephen J put it (at p 113):

> The extent of the privilege is I think this: the man may say, 'If you are going to bring a criminal charge, or if I have reason to think a criminal charge is

going to be brought against me, I will hold my tongue. Prove what you can, but I am protected from furnishing evidence against myself out of my own mouth.'

In *R v Boyes* [1861–73] All ER 172, Cockburn CJ said (at p 174):

> ... that to entitle a party called as a witness to the *privilege of silence*, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer ... a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril. (Emphasis added.)

In *Boyes*'s case, the privilege against self-incrimination is referred to in the report as the *privilege of a witness in not answering, the privilege of silence* and *the privilege of not answering.*

That privilege against self incrimination is a rule of the common law. In this country, s 132(1) of the Evidence Act 1950 has abolished the privilege: see *Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346. In *R v Scott* (1856) Dears & B 47; 169 ER 909, Lord Campbell CJ said (1856) Dears & B 47 at p 59:

> The defendant's counsel relies upon the great maxim of English law *nemo tenetur se ipsum accusare*. So undoubtedly says the common law of England. But Parliament may take away this privilege, and enact that a party may be bound to accuse himself; that is, that he must answer questions by answering which he may be criminated. ... The maxim of the common law therefore has been overruled by the Legislature.

In Malaysia, the legislature has taken away the privilege of not answering on the ground of self-incrimination, so that, a witness in this country cannot refuse to answer to the questions put to him. This is what s 132 of the Evidence Act 1950 says:

> (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> (2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.
>
> (3) Before compelling a witness to answer a question to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of subsection (2).

Subsection (1) has abrogated the privilege. It says that a witness is obliged to answer any question put to him in any civil or criminal proceeding

which is relevant to the matter in issue and that he cannot refuse to answer on the ground of self-incrimination. By this subsection, a witness is bound to answer any relevant question put to him whether in examination-in-chief, cross-examination or re-examination.

By sub-s (2) any answer which a witness is compelled by the court to give will not subject him to arrest, prosecution or be used against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

Subsection (3) merely says that the court, before compelling the witness to answer, has to explain to him what sub-s (2) means and it is that his answers, even though they may incriminate him, will not subject him to arrest or prosecution or be used against him in any criminal proceeding.

By giving evidence before a judge in this country under the letters of request, the witness is protected by s 132(2) from arrest or prosecution for his answers which are inadmissible as evidence against him in criminal proceedings. It follows from this that those answers which have been protected under s 132(2), if repeated in a court of the country which had issued the letters of request, would be similarly protected as though the evidence was taken in this country. This is because those answers had originated in this country where the protection afforded by the subsection applies. It also follows that such protection would extend to answers obtained under cross-examination.

Although a witness can be compelled by the court to answer the questions put to him even though the answers 'will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person', he will only be protected under sub-s (2) from arrest or prosecution or his answers being used in criminal proceedings brought against him. Section 132(2) does not protect him from his answers being used against him in civil proceedings. This is how it was put by Lord Campbell CJ in *R v Scott* (1856) Dears & B 47 at p 60:

> When the Legislature compels parties to give evidence accusing themselves, and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment.

In this country, s 132(2) expressly protects the witness from the consequences of giving incriminating evidence in criminal proceedings only. There is no protection from the consequences of giving such evidence in civil proceedings.

'When the Legislature compels parties to give evidence accusing themselves,' as has been done by s 132(1) of the Evidence Act 1950, the witness cannot even object to his answers being used against him on the ground that they were not given voluntarily. See *R v Scott* (1856) Dears & B 47 in which Lord Campbell CJ said (at pp 58 and 59):

> The next objection is, that the examination was compulsory. It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be

> induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon. Such an objection cannot apply to a lawful examination in the course of a judicial proceeding. Then the defendant's counsel objects that, in the course of this examination, threats were used; the alleged threats, however, were merely an explanation of the enactment of the Legislature upon the subject, and a warning to the defendant of the consequences which, in point of law, would arise from his refusing to give a true answer to the questions put to him.

Such an objection, that is to say, the giving of a true answer to the questions put to him was extracted under compulsion and therefore inadmissible as a confession, cannot apply to a lawful examination in the course of a judicial proceeding where the question was lawful and the party examined was bound by law to answer it. Lord Campbell CJ said it in this way (at p 59):

> This Act of Parliament, 12 & 13 Vict c 106, creates felonies and misdemeanors, and compels the bankrupt to answer questions which may shew that he has been guilty of some of those felonies or misdemeanors. The maxim of the common law therefore has been overruled by the Legislature, and the defendant has been actually compelled to give and has given answers, shewing that he is guilty of the misdemeanor with which he is charged. The accusation of himself was an accomplished fact, and at the trial he was not caled upon to accuse himself. The maxim relied upon applies to the time when the question is put, not to the use which the prosecutor seeks to make of the answer when the answer has been given. If the party has been unlawfuly compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded where the question was lawful and the party examined was bound by law to answer it.

The answers are therefore admissible in civil proceedings brought against the witness. However, in the instant case, since those answers are not going to be of a kind or nature that will admit of any personal liability either in contract or in tort against the witnesses, there is therefore no risk of any civil proceeding being brought against the witnesses because of those answers.

But what if an action is brought against the witnesses in this country for breach of confidence for the disclosures made in their answers to the court which the witnesses were bound by law to furnish? It is a defence to such an action that there was just cause or excuse for the disclosure: see *Fraser v Evans* [1969] 1 QB 349; [1969] 1 All ER 8; [1968] 3 WLR 1172. This is what Lord Denning MR said (*Fraser v Evans* [1969] 1 QB 349 at p 362; [1969] 1 All ER 8 at p 11; [1968] 3 WLR 1172 at p 1179):

> ... *The Sunday Times* say that, in any event, they have just cause or excuse for publishing. They rely on the line of authority from *Gartside v Outram* (1856) 26 LJ Ch 113 to the latest case, *Initial Services Ltd v Putterill* [1968] 1 QB 396; [1967] 3 WLR 1032; [1967] 3 All ER 145, CA. They quote the words of Woods VC in *Gartside v Outram* (1856) 26 LJ Ch 113 at p 114, that '... there is no confidence as to the disclosure of iniquity'. I do not look upon the word 'iniquity' as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence.

The witnesses in the present case have legitimate excuse or reason for breaking confidence because at the time when the questions were put to them, they were bound by law, namely, s 123(1) of the Evidence Act 1950, to make the disclosures. See *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225; [1992] 1 All ER 72; [1992] 2 WLR 50 where the English Court of Appeal held that the police, in response to the order of the court represented by the subpoena duces tecum duly issued, were bound to produce in court the plaintiffs' documents seized by them, and that, therefore, the Vice-Chancellor's order setting aside the subpoena on the police would be set aside. Dillon LJ said ([1992] Ch 225 at pp 256–257; [1992] 1 All ER 72 at p 81; [1992] 2 WLR 50 at p 62):

> ... the powers the police have to use seized documents for the purposes indicated by the Vice-Chancellor do not, in my judgment, absolve the police from the duty which police officers share with every other citizen to obey the orders of the courts in civil proceedings and in particular to obey subpoenas duly served upon them.

He then went on to say ([1992] Ch 225 at p 257; [1992] 1 All ER 72 at p 82; [1992] 2 WLR 50 at p 63):

> ... if it be ... correct ... to say that, because the police officer seizes documents under the Act of 1984 for limited purposes, therefore he owes a duty of confidence to the owner not to use the documents for other purposes, the duty, created by the law, cannot and should not absolve him from having to obey the law if required by process of law to produce the documents in court.
>
> In my judgment, the true view is that the police officer is, like anyone else, and as the Commissioner of Police of the Metropolis concedes, amenable to produce on subpoena any documents in his possession, subject to the true owner having the right to challenge the subpoena, or the production of the documents, on any of the grounds on which a subpoena can be challenged. This would of course include, as is conceded, the ground of legal professional privilege in favour of the true owner. *But it would not include any such grounds of confidentiality as between the police and the true owner*, or abuse of power as have been suggested; it is not an abuse of power for a police officer to obey an order of a civil court of competent jurisdiction. (Emphasis added.)

And this is what Nolan LJ said ([1992] Ch 225 at p 260; [1992] 1 All ER 72 at p 85; [1992] 2 WLR 50 at p 66):

> The statutory powers given to the police are plainly coupled with a public law duty. The precise extent of the duty is, I think, difficult to define in general terms beyond saying that the powers must be exercised only in the public interest and with due regard to the rights of individuals. In the context of the seizure and retention of documents, I would hold that the public law duty is combined with a private law duty of confidentiality towards the owner of the documents. The private law duty appears to me, as it did to the Vice-Chancellor, to be of the same character as that which formed the basis of the House of Lords decision in *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. It arises from the relationship between the parties. It matters not, to my mind, that in this instance, so far as the owners of the documents are concerned, the confidence is unwillingly imparted.

My disagreement with the Vice-Chancellor, as I have indicated, stems from my belief that the duty of confidence in circumstances such as those of the present case is outweighed by the requirements of a subpoena.

There is no duty of confidence where the disclosure is made in obedience to the law which required it to be made. In the present case, the duty of confidence is outweighed by the requirements of s 132(1) of the Evidence Act 1950.

For the reasons which I have stated in this judgment, I agree with my Lord Gopal Sri Ram JCA in allowing these appeals which were heard together and granting the declaration sought by the parties in the modified form as appears in the judgment of my Lord.

13 July 1995

Siti Norma Yaakob JCA: I have had the opportunity of reading the draft judgments of my brothers, Gopal Sri Ram and NH Chan JJCA and I concur with the reasons as stated by them when allowing this appeal and granting the declaration on terms that had been agreed to by all the parties in these proceedings.

Appeal allowed.

Reported by Kevin Ooi